(7)

No. 01-417

IN THE

Supreme Court of the United States

ROBERT J. DEVLIN,

Petitioner,

v.

ROBERT A. SCARDELLETTI, Trustee of the Transportation Communications International Union Staff Retirement Plan, *et al.*,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether a class member who, upon receiving notice of a proposed class action settlement, objects and moves to intervene has standing to appeal the district court's approval of the settlement?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Robert J. Devlin was an appellant below. The Retired Employees Protective Association was also an appellant below.

The respondents in this Court, appellees below, are: Robert A. Scardelletti, Frank Ferlin, Jr., Joel Parker, and Don Bujold, as Trustees of the Transportation Communications International Union Staff Retirement Plan; and George Thomas Debarr and Anthony Santoro, Sr., individually and as representatives of subclasses of all persons similarly situated.

Other persons named in the court of appeals' caption, but who neither participated in the court of appeals nor are respondents here, are: Donald A. Bobo, R.I. Kilroy, F.T. Lynch, and Frank Mazur, Defendants; and A. Meaders, James H. Groskopf, Thomas C. Robinson, Doyle W. Beat, Miriam E. Parrish, Robert A. Parrish, Desmond Fraser, James L. Bailey, Dorothy Deerwester, Thomas J. Hewson, Clay B. Wolfe, Kenneth B. Lane, Brian A. Jones, and Charles O. Swasy, Parties in Interest.

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OPINIONS BELOW

Petitioner seeks to appeal a judgment approving a class action settlement. The district court's orders denying petitioner's motion to intervene, approving the settlement, and entering a final judgment (Pet. App. B1, C1-C3) are unpublished. The Fourth Circuit's opinion (per Williams, J., joined by Anderson, D.J., sitting by designation; Michael, J., concurring in part and concurring in the judgment) (*id.* A1-A35) holding that petitioner lacks standing to appeal the settlement because he was not a named party in the district court is published at 265 F.3d 195.

JURISDICTION

The Fourth Circuit entered its opinion on July 27, 2001. The petition for certiorari was filed on September 7, 2001,

and granted on December 10, 2001. This Court has jurisdiction pursuant to 28 U.S.C. § 1254 (1).

STATUTE INVOLVED

28 U.S.C. § 1291 provides in relevant part: "The courts of appeals * * * shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * *."

STATEMENT OF THE CASE

This case presents the question whether petitioner has the right to appeal a district court judgment that approves a class action settlement and thereby substantially reduces his retirement benefits. It is undisputed that petitioner is a class member directly bound by the judgment, timely objected to the settlement in the district court, has a substantial personal stake in overturning the judgment, and timely sought to appeal. A divided panel of the Fourth Circuit nonetheless held that petitioner could not appeal because, in the majority's view, appeals by class action objectors could undermine the orderly litigation of the case. Nor could petitioner appeal as an intervenor, the majority held, because he acted too late by not moving to intervene until he learned of the proposed settlement.

The court of appeals' decision is wrong as a matter of law and logic. Class action objectors – like derivative shareholders (cf. *California Pub. Employees' Retirement Sys.* v. *Felzen*, 525 U.S. 315 (1999) (equally divided court)) – satisfy all the criteria for appealing set forth in applicable rules, statutes, and the Constitution. Even if derivative shareholders do not have the right to appeal, the same cannot be said of members of a properly certified class, for (unlike derivative shareholders) they are "parties" directly bound by the judgment and they pursue their own personal interests on appeal (as opposed to the interest of a third-party

corporation). Petitioner's right to appeal cannot be abrogated by the prudential concerns articulated by the majority below, which, in any event, rest on profound misconceptions about class action litigation. In particular, appeals by objectors benefit the process of class action litigation not only by identifying legal errors by the district court (*e.g.*, *Amchem Products, Inc.* v. *Windsor*, 521 U.S. 591 (1997)) but also by deterring collusive settlements. Finally, if objectors technically must intervene to appeal the approval of a settlement, then petitioner's motion to intervene was timely as a matter of law because he filed it as soon as he received a copy of the proposed settlement. The judgment below accordingly should be reversed.

1. The suit underlying this petition involves the ERISA-governed retirement plan for the staff of the Transportation Communications International Union. Petitioner was a full-time employee of the Union from 1963 until his retirement in 1983, at which time he began receiving retirement benefits under the Plan.

By virtue of a 1989 amendment, the Plan provided for a one-time, ten-percent cost of living adjustment ("COLA") effective five years after retirement. In early 1991, the Plan's trustees adopted a plan amendment ("the 1991 Amendment") to provide a more substantial COLA to offset the substantial reduction in retirees' effective benefits that had been caused by inflation. The 1991 Amendment provided that, every three years, beneficiaries would receive a COLA equivalent to the rate of inflation for that period, up to a maximum of ten percent per COLA ("the 1991 COLA").

Later in 1991, the Plan elected new trustees. Those trustees determined that the financial projections underlying the 1991 Amendment were incorrect, and in 1993 they eliminated the 1991 COLA for ail subsequent retirees. The trustees determined, however, that as to persons (such as petitioner) who had already retired and were receiving benefits under the 1991 Amendment, the COLA was an

"accrued" benefit that could not be eliminated through a plan amendment. See 29 U.S.C. § 1054(g)(1).

To recoup the costs of this accrued benefit to the Plan, the new trustees sued the old trustees, seeking damages for breach of fiduciary duties. The district court agreed that the old trustees had breached their fiduciary duties in approving the 1991 COLA based on faulty financial assumptions. The district court also initially agreed with the new trustees that the COLA was an accrued benefit for persons who had retired, see *Scardelletti* v. *Bobo*, 897 F. Supp. 913 (D. Md. 1995), but subsequently reversed itself, see *Scardelletti* v. *Bobo*, No. JFM-95-52, 1997 U.S. Dist. LEXIS 14498 (D. Md. Sept. 8, 1997). Petitioner was not a party to that litigation, and no party had any interest in appealing from the district court's decision as a result of a subsequent settlement.

2. In response to the district court's decision reversing itself, the new trustees unilaterally eliminated the 1991 COLA for all past and future retirees. Petitioner's retirement benefits were reduced by approximately forty percent as a result. To confirm their right to eliminate the COLA, the new trustees instituted this litigation, leading to the settlement that petitioner seeks to appeal. Petitioner is a member of the defendant class. Respondents are the plaintiffs – the plan trustees – and the named defendants – the class representatives.[1]

a. To confirm their right to eliminate the 1991 COLA, the new trustees brought this defendant class action in the District of Maryland against all participants and beneficiaries of the plan, approximately 700 persons in total. The district court subsequently divided the defendant class into subclasses of retired plan beneficiaries and active plan participants. Because class certification was not sought pursuant to Rule

[1] Throughout the case, the Union has paid the attorney's fees of the class representatives. The settlement provides that the Plan will reimburse the Union for those costs.

23(b)(3), the individual class members were prohibited from opting out.

Petitioner is a member of the retiree subclass. He is also the president of the Retired Employees Protective Association ("REPA"), a group composed of a majority of Union retirees, more than four hundred persons in all, which seeks to preserve the retirees' benefits under the plan. The new trustees originally named petitioner as a defendant and a class representative, but he declined to serve in that capacity. The trustees subsequently named a new class representative as a defendant in their suit.

The plaintiff trustees subsequently reached a proposed settlement with the class representatives. The details of the settlement are not relevant here, but in broad outline it abrogates the 1991 Amendment and essentially eliminates the 1991 COLA for the retirees for the future. The settlement thus has a very substantial negative financial effect on approximately 400 retirees such as petitioner, drastically reducing the retirement benefits that they had been receiving.

The district court conditionally certified the case to permit the settlement to be preliminarily approved and, pursuant to Fed. R. Civ. P. 23(e), distributed to the class members to submit objections. J.A. 30-33. Respondents subsequently submitted the settlement and notice, which the court approved. *Id.* 47-55, 76-79.

The district court's order provides that "[m]embers of the Class may object to the proposed settlement" by submitting all objections in advance of the fairness hearing. J.A. 78. Furthermore, "[a]ny member of the Class who does not make his or her objection or opposition to the proposed settlement in the manner provided herein shall be deemed to have waived all objections and opposition to any and all matters to be considered at the Hearing and any and all subsequent hearings on these matters." *Id.* 79.

The class notice advises each class member in its first sentence that their "rights may be affected by this class action litigation" (J.A. 54 (capitalization omitted)) and subsequently acknowledges that "members of the Retiree Subclass have an interest in restoring and maintaining the 1991 COLA." The notice further specifies that class members have the "right . . . to present [their] views to the court" (*id.* 50) and that "the Court must examine the terms of this settlement and consider any objections to the settlement that may be made by any member of the Class" (*id.*). It advises each class member that "you may enter a legal appearance individually or through your own counsel at your expense." *Id.* 51-52. "Any member of the Class who does not enter an appearance through counsel in the Action will be represented by counsel for his or her Subclass." *Id.* 52.

The class notice (which, as noted, was drafted by respondents and approved by the district court) also specifically contemplated that class members could appeal the entry of the settlement. "[I]f an appeal is filed, the settlement will remain contingent until all appellate proceedings are concluded. Therefore, if an appeal is taken, it may be several months before the settlement becomes final, assuming the appellate court also approves the settlement." J.A. 51.

b. Promptly upon learning the terms of the proposed settlement, petitioner formally moved to intervene in the case. J.A. 56-71.[2] Petitioner styled his motion to intervene as a "Cross-Motion" to respondents' motion for preliminary approval of the settlement. As a party intervenor, petitioner sought to oppose the settlement, as well as to take discovery, secure an injunction against eliminating the 1991 COLA, and disqualify the class counsel. The trustees opposed the motion

[2] Petitioner moved to intervene approximately two weeks after the settlement was submitted to the district court for preliminary approval – well before notice of the settlement was provided to the class and far in advance of the deadline for filing objections.

as it pertained to petitioner's objections to the settlement on the ground that he should "raise any objections to the proposed settlement agreement at the fairness hearing" in the manner specified by the class notice. J.A. 80. The trustees thus asserted that intervention should be denied because,

> *[m]ost importantly*, as a member of the Retiree Class, Mr. Devlin will have a full opportunity to raise all of his concerns about the settlement agreement, the negotiations, and the adequacy of the class representatives at the fairness hearing on November 12, 1999, prior to any approval of the proposed settlement. Intervention is not required to achieve that end. Because intervention is *wholly unnecessary* to allow Mr. Devlin to raise *any factual or legal issues concerning the settlement* and because of the substantial delay and likely prejudice that would otherwise result, the Trustees respectfully urge the Court to deny Mr. Devlin's motion to intervene.

J.A. 92 (emphases added).[3] The trustees also maintained that the class representatives were entirely adequate, necessarily precluding intervention as a matter of right. *Id.* 86-90.

The district court denied petitioner's motion to intervene. Pet. App. B1. Because petitioner therefore lacked status as a named party, the district court also denied as moot his motions for discovery, for an injunction, and to disqualify. *Id.*

c. Petitioner separately filed timely objections to the settlement on behalf of himself individually and also on

[3] Although the trustees argued that petitioner should have moved to intervene at an earlier date because he was personally aware that settlement discussions were ongoing, they also argued that no class member could intervene once respondents had "signed a settlement and a fairness hearing on the settlement has been scheduled," because at that point "[i]t is simply too late in the proceedings to intervene without undoing [that] progress." J.A. 84.

behalf of REPA. J.A. 104-16. Petitioner argued, for example, that the settlement was unlawful because (as the new trustees had *themselves* maintained in their prior suit against the old trustees) the 1991 COLA was in fact an accrued benefit under ERISA for pre-1991 retirees. Based on the district court's earlier, unappealed ruling to the contrary, respondents disagreed.

Petitioner also maintained that the district court should not approve the settlement because it was unfair. In petitioner's view, the plan could afford to maintain the COLA at least in part by requiring active employees to make pension contributions, just as petitioner had done for many years before the plan became entirely employer funded. Respondents disagreed, arguing that the retirees had already recouped the value of their individual contributions. Respondents also argued that the settlement fairly reflected the risks to all parties in litigating the case to judgment.

The district court agreed with respondents and rejected petitioner's objections to the settlement. The district court advised petitioner's counsel, "if I'm wrong [in rejecting petitioner's objections], you got an appeal." J.A. 154; see also C.A. Supp. App. 1240 ("I am perfectly clear that my order approving the class settlement should be appealed, should be reviewed by the Fourth Circuit in due course."). The court accordingly entered a final judgment approving the settlement. Pet. App. C1-C3.[4]

3. The trustee respondents subsequently invoked the final judgment to seek an injunction (enforced upon threat of contempt sanctions) prohibiting class members from making any court filing in any other jurisdiction that related to the subject matter of the settlement. According to the trustees,

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[4] The final judgment was delayed while the parties modified the settlement to accommodate the objections of a class member that the settlement was unfair as applied to him individually. See J.A. 15-17 (Nos. 115, 118, 124).

"[a]ll those attacks [on the settlement] really belong, if anywhere, here and in the Fourth Circuit." C.A. Supp. App. 897 (injunction hearing). The basis for the injunction was that each class member was bound to the settlement as a matter of res judicata. The district court agreed and enjoined all class members "from making any filing in any forum against any person * * * that raises issues encompassed within the settlement of this action or that directly or collaterally attacks the settlement of this matter, except in this Court or on appeal from the Orders of this Court." J.A. 170-71.

4. On petitioner's appeal from the district court's final judgment, a panel of the Fourth Circuit held (i) that the district court properly denied petitioner's motion to intervene and denied as moot petitioner's further motions that depended on his status as a formal party, and (ii) that petitioner lacked standing to appeal the district court's approval of the settlement.

a. The Fourth Circuit did not doubt that petitioner had the right to appeal the district court's denial of his motion to intervene, notwithstanding that petitioner was not a named party in the district court. Rather, the Fourth Circuit held that the district court properly refused to permit petitioner to intervene on the ground that his motion was untimely. Pet. App. A10 ("Under either Rule 24(a) or 24(b), the application for intervention must be timely."). Permitting petitioner to intervene at the conclusion of settlement negotiations, the court concluded, "would have likely resulted in further delay and substantial additional litigation." *Id.* A12. On that basis, the court of appeals also affirmed the district court's denial of petitioner's motions for discovery, for an injunction, and to disqualify, all of which depended on petitioner's status as a named party. *Id.* A13 n.11.

b. The panel divided on the distinct question whether petitioner nonetheless could appeal the district court's approval of the *settlement* over his objections. The majority

held that petitioner lacked standing and therefore refused to reach the merits of his appeal. The panel majority concluded that "the need for effective class management and to avoid class fragmentation weighs strongly in favor of limiting the possibility that last-minute 'spoilers' who were not entitled to intervene below might unduly delay class settlement on appeal." *Id.* A21. The majority "fail[ed] to see how effective class management can be accomplished if non-named class members who were not entitled to intervene before the district court can nevertheless usurp the role of the class representative and, in effect, act as intervenors by contesting the merits of the class settlement on appeal." *Id.*

The panel majority rejected, however, the view of some circuits that objectors' standing is precluded on the basis of this Court's three-paragraph per curiam opinion in *Marino* v. *Ortiz*, 484 U.S. 301, 304 (1988), which states that "[t]he rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment, is well settled," and that "the better practice is for such a nonparty to seek intervention for purposes of appeal." *Marino* involved only an attempt to appeal a class action judgment by persons who were neither named parties nor even class members. The majority below therefore agreed with the Second and Third Circuits that *Marino* is properly distinguished because it "did not involve members of a class action who were objecting to a class settlement." Pet. App. A16 n.12.

c. Judge Michael would have adopted what he regarded as the "better reasoned precedent hold[ing] that an unnamed, objecting class member has standing to appeal a district court order approving a class action settlement." Pet. App. A30 (citing *In re PaineWebber Inc. Ltd. P'ships Litig.*, 94 F.3d 49 (CA2 1996); *Bell Atl. Corp.* v. *Bolger*, 2 F.3d 1304 (CA3 1993); *Marshall* v. *Holiday Magic, Inc.*, 550 F.2d 1173 (CA9 1977); 7B Charles Alan Wright *et al.*, FEDERAL PRACTICE & PROCEDURE, § 1797 ("Of course, if the class member appears in response to the notice and puts forth his objections, he can

attack the dismissal or compromise [of the class action] on appeal from the entry of the final judgment.")).

Judge Michael explained that the right of an objecting class member to appeal dates to early equity practice and is furthermore supported by constitutional and practical considerations. Pet. App. A31 (citing Joseph Story, COMMENTARIES ON EQUITY PLEADINGS § 94 (10th ed. 1892)). Because a class action settlement affects the rights of all class members, a rule refusing to permit non-named class members to appeal raises due process concerns. *Id.* Under the majority's approach, class members will be largely unable to protect their interests because they generally do not learn of their interest in intervening until provided with notice of the proposed settlement by the district court, by which point (under the panel majority's holding) it is too late to intervene and thereby preserve their right to appeal. *Id.* A33-A34.

Judge Michael also maintained that the majority's approach undermines district courts' administration of class actions. The prospect that objectors may appeal provides an important check on collusive settlements by the class representatives and their counsel. Pet. App. A32. Moreover, if prohibited from appealing, objectors will be more likely to opt out from the class or to institute collateral attacks on settlement orders. *Id.* A33 (citing *Walker* v. *City of Mesquite*, 858 F.2d 1071, 1075 (CA5 1988) (unnamed class members may "challenge the adequacy of class representation * * * by filing a separate lawsuit for that purpose")). Alternatively, district courts will be burdened with unnecessary motions to intervene, while courts of appeals, in turn, will be burdened by interlocutory appeals if intervention is denied. *Id.* A34. Conversely, as demonstrated by the experience of other circuits, there is no substantial risk that objectors will file meritless appeals of settlements, doubtless because in all but the most meritorious cases "the projected expenses will outweigh the potential for convincing the appeals court that the district court abused its discretion in approving a

settlement after considering the objector's concerns." *Id.* A32.

d. The Fourth Circuit separately addressed petitioner's appeal from the district court's injunction against class members making any court filing in any other jurisdiction that relates to the subject matter of the settlement. The injunction rested on the fact that the entire class was bound by the settlement as a matter of res judicata. Notwithstanding the court of appeals' holding that objectors could not appeal the settlement, it nonetheless held that they could properly be enjoined from acting in derogation of it. Pet. App. A29. Rejecting petitioner's substantive challenges to the injunction, the court simply remanded the injunction for the district court to reenter it in the form required by Fed. R. Civ. P. 65. *Id.* On remand, the district court reinstated the injunction. J.A. 174-77.

SUMMARY OF ARGUMENT

Neither respondents nor any of the courts of appeals dispute that objectors meet the settled statutory and constitutional requirements for appealing. A district court's approval of a settlement is an appealable "final decision" for purposes of the appellate jurisdiction statute. Class members furthermore have Article III standing to appeal the district court's judgment because they have a direct and personal interest in the outcome of the case that would be remedied by a favorable ruling on appeal. Unlike derivative shareholders, that interest is entirely personal to the appealing class member. Accordingly, objectors could be denied the right to appeal only if (i) they do not satisfy the general rule that only "parties" may appeal, or (ii) some special restriction on appealability (not embodied in the governing statutes or rules) could and should be announced. Neither of those assertions can be sustained under this Court's precedents and sound principles of judicial administration.

Most courts that deny standing to objectors rely on the rule that only "parties" may appeal. That reasoning is flawed, however, because this Court's precedents settle that the right to appeal extends to all parties *to the judgment* as opposed to merely *named* parties. Under those precedents, the relevant question is not whether the appellant is individually, as opposed to categorically, identified in the caption of the complaint, but rather whether the appellant is directly bound by the ruling from which he appeals. The same conclusion follows from this Court's precedents holding that "quasi-parties" and even certain "nonparties" may appeal. All members of a class, once certified, are bound by the court's judgment, and therefore are entitled to appeal if they have filed objections and thus preserved the arguments they seek to raise. The absence of a class certification procedure under Rule 23.1 again distinguishes class actions under Rule 23 from appeals brought by objecting derivative shareholders.

The policy reasons offered by the Fourth Circuit for nonetheless denying objecting class members the right to appeal cannot abrogate the basic statutory right to appeal and, in any event, are unpersuasive. When class members pursue their objections to a settlement on appeal, they do not in any sense "usurp" the role of the class representative. The representative has no right to preclude objections; to the contrary, Rule 23(e) guarantees every class member the right to present any objection to a settlement. Furthermore, appeals by objectors identify legal errors in orders approving settlements and deter collusive settlements.

Although the court of appeals held that objectors could preserve their right to appeal by intervening, this Court has squarely rejected that reasoning in closely related circumstances on the ground that it would undermine orderly class action proceedings. In any event, if intervention *is* required, the district court erred in refusing to permit petitioner to intervene limited to the right to contest and subsequently appeal the settlement.

ARGUMENT

I. OBJECTORS SATISFY EVERY REQUIREMENT FOR APPEALING ESTABLISHED BY STATUTE, RULE, AND THE CONSTITUTION.

While disagreeing over whether non-intervening class members are "parties" for the purpose of any rule that only parties can appeal, the litigants in this case, and all of the courts of appeals, necessarily *agree* that class members who have objected to a settlement and who are bound by the judgment satisfy all of the other requirements for an appeal as of right under the governing statute and rules, as well as under Article III of the Constitution.

The district court's approval of a class action settlement is appealable because it is embodied in a "final judgment" that terminates the case on the merits. See Pet. App. C1-C2 ("Final Order"; "This action is dismissed with prejudice."); 28 U.S.C. § 1291 ("The courts of appeals * * * shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * *."). The Federal Rules of Appellate Procedure, in turn, are coextensive with the statute's jurisdictional grant. See Fed. R. App. P. 1(b) ("These rules do not extend or limit the jurisdiction of the courts of appeals.").

An objecting class member's appeal of the settlement also presents a cognizable "case or controversy" for purposes of Article III of the Constitution. The class member asserts that the settlement did not provide him all the relief he seeks and to which he is entitled under the law. The class member thus presents a claim that he suffered an "actual" invasion of a "legally protected interest" that is "concrete and particularized," that is "fairly traceable" to the settlement being challenged, and that is "likely * * * [to] be redressed by a favorable decision" on his objections. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 598-61 (1992) (citations and

quotation marks omitted). Indeed, as Judge Easterbrook, in his most recent opinion on the subject, has recognized:

> Although several decisions (again *Scardelletti* is a good example) discuss the problem as if the question were whether class members have "standing" to appeal, we do not think that this is apt. Class members suffer injury in fact if a faulty settlement is approved, and that injury may be redressed if the court of appeals reverses. What more is needed for standing?

In re Navigant Consulting, Inc., Secur. Litig., -- F.3d --, 2001 WL 1646846, at *-- (CA7 Dec. 26, 2001).

In this respect, there is arguably a distinction between the unquestionably direct personal interest of objecting class members under Rule 23 and the indirect interest pursued by objecting derivative shareholders under Rule 23.1. The *Felzen* respondents argued in this Court that derivative shareholders pursue only the direct interests of the corporation, as opposed to their own direct personal interests, contrasting derivative suits with actions in which shareholders sue to recoup the lost value of their shares. The *Felzen* respondents thus essentially retreated to the position that, although unnamed class members under Rule 23 *do* have the right to appeal, derivative shareholders lack a sufficiently direct personal interest to pursue an appeal. See, *e.g.*, No. 97-1732, Oral Arg. Trans. at 37.

Notwithstanding the absence of any plausible objection under the applicable statute, rules, and the Constitution, some circuits refuse to hear appeals by objecting, but non-intervening, class members on two bases: (1) That they are not "parties"; and (2) that policy considerations disfavor such appeals. Neither of those grounds is persuasive. Objectors are "parties" for purposes of the general rule that only "parties" may appeal from a final decision. Furthermore, objectors' right to appeal is consistent with sound principles of judicial administration and, in any event, there is no basis

for adopting a special restriction on appealability nowhere embodied in the governing statutes or rules.

II. Objecting Class Members Are "Parties" Having the Right to Appeal.

A. The Term "Parties" Encompasses All Persons Directly Bound by a Judgment, Not Merely the Named Representatives Acting as Agents for Multiple Individuals.

One justification offered for denying non-intervening class members the right to appeal a class settlement order is the general rule that only "parties" are permitted to appeal. Although the Fourth Circuit in this case seemed to reject that view, see Pet. App. A15-A16 n.12, the issue bears discussing because the "party" requirement is the only formal rule that could conceivably be argued to preclude petitioner's appeal. If petitioner is indeed a "party," or if the rule is not so formal as some circuits might suggest, then the preclusion of petitioner's appeal rests entirely on an exercise in judicial policy making untethered from any restrictions imposed by statute, rule, or the Constitution, which cannot overcome an otherwise clear right to appeal.

In *Marino* v. *Ortiz*, this Court stated in its per curiam opinion that "[t]he rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment, is well settled." 484 U.S. at 304. Some cases extrapolate from this general rule to the proposition that, because unnamed class members are, by definition, not individually named in the caption of the case, they are not "parties" entitled to appeal a final decision. *E.g.*, *In re Navigant*, -- F.3d at --, 2001 WL 1646846, at *-- ("members of a class (other than the named representatives) are not automatically parties"); *In re Brand Name Prescription Drugs Antitrust Litig.*, 115 F.3d 456, 457 (CA7 1997) (appellant class members "are not named plaintiffs"); cf. *Felzen* v. *Andreas*, 134 F.3d 873, 874-75 (CA7) (discussing view that unnamed shareholders in derivative suits are nonparties), *aff'd by equally divided Court*, 525 U.S. 315 (1999). The flaw in this reasoning is that it begs the question of who is a "party" for purposes of the right to appeal.

Under this Court's settled precedents, "party" status for purposes of the right to appeal is not limited to individually identified or "*named*" parties to a case, as some courts assume.[5] Instead, appellate "party" status extends to all persons over whom a district court exercises jurisdiction, who are directly bound by a final order or judgment of that court, and hence who are "parties" to the particular final decision from which they appeal. Thus, in the case cited by *Marino* for the proposition that only parties may appeal, *United States ex rel. Louisiana* v. *Jack*, the settled rule was described as precluding appeals from a judgment by a person "'who is not a party or privy to the record'" and that "'one who is not a party to a record and judgment is not entitled to appeal therefrom.'" 244 U.S. 397, 402 (1917) (quoting *Bayard* v.

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[5] Furthermore, it is a somewhat inaccurate usage to say that an objecting member of a properly certified class is not a "named" party in the case. While petitioner is not *individually* named in the caption of the case, he is certainly "named" categorically through the description of the class on whose behalf the individual representative purports to act. If that description is sufficient to identify petitioner for purposes of exercising jurisdiction over him and binding him by the resulting judgment, then it should be sufficient to "name" him as a party for purposes of Federal Rule of Appellate Procedure 3(c). Cf. *Torres* v. *Oakland Scavenger Co.*, 487 U.S. 312, 318 (1988) ("The purpose of the specificity requirement of Rule 3(c) is to provide notice both to the opposition and to the court of the identity of the appellant or appellants."; use of generic designation "*et al.*" would "leave the appellee and the court unable to determine with certitude whether a losing party not named in the notice of appeal should be bound by an adverse judgment * * *."); *National Center for Immigrants' Rights* v. *INS*, 892 F.2d 814, 816 (CA9 1989) ("*Torres* does not require that the individual names of the appealing parties be listed in instances in which a generic term, such as plaintiffs or defendants, adequately identifies them.").

Lombard, 50 U.S. (9 How.) 530, 551 (1850); *In Re Leaf Tobacco Board of Trade*, 222 U.S. 578 (1911) (per curiam)).

The precise scope of the term "party" for purposes of appeal was succinctly described in *Hinckley* v. *Gilman, Clinton, & Springfield R.R. Co.*, 94 U.S. (4 Otto) 467 (1876), in which this Court allowed an appeal by a receiver charged with distributing the proceeds of a foreclosure action, but who was not involved in or a party to the underlying litigation. This Court defined the receiver's appellate rights and party status according to the authority exercised by the lower court and the scope of the judgment or order being appealed:

> The receiver cannot and does not attempt to appeal from the decree of foreclosure, or from any order or decree of the court, except such as relates to the settlement of his accounts. *To that extent he has been subjected to the jurisdiction of the court, and made liable to its orders and decrees*. He has, therefore, the corresponding right to contend against all claims made against him. *For this purpose he occupies the position of a party to the suit*, although an officer of the court, and after the final decree below has the right to his appeal here.

94 U.S. (4 Otto) at 469 (emphasis added); see also *Indiana Southern R. Co.* v. *Liverpool, London & Globe Ins. Co.*, 109 U.S. 168, 173 (1883) (person seeking to appeal from a decree in a suit to which he was denied intervention was "not a party *to the decree* from which he appeals" (emphasis added)).

In the present case, of course, petitioner is undeniably a "party to the decree from which he appeals" because the settlement order expressly acts upon a certified class of persons that includes petitioner. That order also plainly adjudicates petitioner's individual rights, as confirmed by the injunction entered against him on the basis of the settlement order. Furthermore, petitioner is also a party to the "record" as it relates to the order approving the settlement. He entered

his objections on the record and appeared before the court to advance those objections. And he did so not as a matter of grace, but as a matter of *right*, pursuant to Rule 23(e).[6]

Mere citation to *Marino*'s general rule that only "parties" may appeal thus ultimately begs the question of whether non-intervening class members bound by a judgment are *already* "parties" for such purpose. An analysis of the actual facts and holding in *Marino*, however, strongly supports the proposition that class members who are bound by a court's judgment *are* parties for purposes of appealing that judgment.

Marino was a class action brought by minority police officers alleging that the New York Police Department's sergeant's examination was discriminatory. Class representatives and the Police Department reached a settlement, and at the final fairness hearing a group of white police officers, *who were not class members and who had not sought to intervene*, appeared and presented their objections to the settlement. The district court nonetheless approved the settlement, and the group of white officers appealed. The Second Circuit affirmed, not on the merits, but on the ground that the appellants were not parties to the action.

This Court affirmed, per curiam, applying the "well settled" principle "that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment." *Marino*, 484 U.S. at 304. Responding to the Second Circuit's suggestion that there might be some exception to this general principle, the Court noted that "the better practice is for such

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[6] The right to object on the record and appear in defense of those objections is tantamount to a *per se* grant of limited intervention for the purposes of challenging a settlement. Having exercised that right, petitioner became a party to the record, and upon entry of the final order certifying the class and disposing of his claims, he became a party to the judgment as well. That he may or may not have been a "party" to other aspects of the proceedings is entirely irrelevant when he only seeks appeal from the final decision to which he *was* a party.

a *nonparty* to seek intervention for purposes of appeal." *Id.* (emphasis added).

Marino, however, emphasized that the appellants were not class members, had not intervened, and hence were effectively strangers to the proceedings. See 484 U.S. at 303 (contrasting depiction of the black and Hispanic *plaintiff class members* with the *non-party* white officers). The strong implication of that emphasis and distinction is that had the appellants in fact been class members, intervention would have been unnecessary. Thus, if anything, *Marino* supports the view that objecting class members are already "parties" who need not also intervene to appeal from approval of a class action settlement.

That "party" status for purposes of appeal is a function of being *bound* by a judgment or order, rather than a function of being individually named in the caption of a case, can be seen from a variety of circumstances in which appeals are uniformly allowed. Two general lines of precedents illustrate the point. In both, the appellants were not named plaintiffs or defendants but nonetheless participated in the district court and were bound by a ruling of the court. It would be profoundly inconsistent with those precedents to hold that unnamed plaintiffs and defendants to a judgment who similarly participate in the case may not appeal despite their direct personal stake in the outcome.

First, this Court has long recognized the right to appeal of "quasi-parties" – *viz.*, persons who, like petitioner, are not individually named as formal parties to the litigation but (i) have a direct stake in the outcome, (ii) have a recognized right to participate in the case, and (iii) do in fact participate. For example, in *Blossom* v. *The Milwaukee Railroad*, 68 U.S. (1 Wall.) 655 (1863), Blossom had requested that the district court complete a foreclosure sale in which he had bid on the property, but the district court refused. When Blossom subsequently sought to appeal that ruling, the respondents objected that he was not a formal party to the case. This

Court answered the question "[i]s the appellant so far a party to the original suit that he can appeal" in the affirmative, explaining that Blossom was entitled to appeal with respect to that part of the case in which he had properly participated. The Court found it clear that Blossom could not "appeal from the original decree of foreclosure, nor from any other order or decree of the court made prior to his bid." 68 U.S. (1 Wall.) at 655. But the Court found it equally "well settled, that after a decree adjudicating certain rights between the parties to a suit, other persons having no previous interest in the litigation may become connected with the case, in the course of the subsequent proceedings, in such a manner as to subject them to the jurisdiction of the court, and render them liable to its orders; and that they may in like manner acquire rights in regard to the subject-matter of the litigation, which the court is bound to protect." *Id.* at 655-56. The Court cited as examples appeals by "[s]ureties, signing appeal bonds, stay bonds, delivery bonds, and receipters under writs of attachment," all of whom "become quasi parties to the proceedings, and subject themselves to the jurisdiction of the court." *Id.*

Subsequently, this Court held that a district court order approving fees for a trustee could be appealed by objectors who had appeared in the trial court but had not formally intervened. *Williams* v. *Morgan*, 111 U.S. 684 (1884). The Court cited *Blossom* and its progeny as sustaining quasi-parties' right "to come into this court, or to be brought here on appeal, when a final decision of their right or claim has been made by the court below." 111 U.S. at 699.[7] The Court

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[7] *Blossom*'s progeny include *Hovey* v. *McDonald*, 109 U.S. 150, 155-56 (1883) (when non-party receiver received order in his favor, appeal could be brought against him); *Trustees* v. *Greenough*, 105 U.S. 527, 531 (1882) (trustees may appeal award in favor of complainant suing on behalf of a trust fund); *Sage* v. *Railroad Co.*, 96 U.S. 712, 714 (1878) (quasi-parties interested in order confirming a sale may appeal); *Hinckley* v. *Gilman, Clinton & Springfield R.R. Co.*, 94 U.S. 467, 469 (1877) (non-party

accordingly concluded that the objectors "had such an interest [in the trustee charges], and were so situated in the cause, that they had a right, by leave of the court, to except and object to the charges and allowances presented by the trustees and receivers, and that they had a right to appeal from the decree of the Circuit Court to this court." *Id.* at 700.[8]

Second, this Court has explicitly held, and the circuits have uniformly recognized, that certain "*nonparties*" to the case may nonetheless appeal various orders applicable to them. Such holdings recognize that, for purposes of appeal, those persons are "parties" to the final decision from which they appeal notwithstanding that they did not participate as named parties to the litigation. One example is *Marino*'s explicit recognition that "denials of [motions to intervene] are, of course, appealable." 484 U.S. at 304. Other examples include: appeals from contempt orders, *United States Catholic Conference* v. *Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76 (1988) ("The right of a nonparty to appeal an adjudication of contempt cannot be questioned."); appeals from orders imposing attorney sanctions, *Rogers* v. *National Union Fire Ins. Co. of Pittsburgh*, 864 F.2d 557, 559-60 (CA7 1988) ("When a district court sanctions attorneys the attorneys are the real parties in interest, and the attorneys must appeal in their own names. A notice of appeal naming the party (in this case the plaintiffs) as the appellant, not the attorneys, does not create jurisdiction over the attorneys' appeal. Because the notice of appeal does not name [the attorneys] as the parties taking this appeal, we have no jurisdiction over their appeal." (citations omitted)); and

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receiver may appeal order directing him to pay money); and *Minnesota Co.* v. *St. Paul Co.*, 69 U.S. (2 Wall.) 609, 633-34 (1865) (appeal may be brought against persons who were "nominal parties" but not formal parties to the judgment).

[8] Even if this Court were to conclude that petitioner was not a "party" for purposes of the right to appeal, he would be entitled to appeal under the "quasi-party" line of decisions.

appeals from orders limiting attorney's fees, *Bowling* v. *Pfizer, Inc.*, 102 F.3d 777, 779 (CA6 1996) (class counsel and various other law firms appeal as "separate parties" from district court orders relating to fee award).

The Seventh Circuit's view that class members are not automatically parties because they are not counted towards the jurisdictional requirement of "complete" diversity in suits raising state-law claims (*In re Navigant*, -- F.3d at --, 2001 WL 1646846, at *--.) is incorrect The diversity jurisdiction statute does not refer to "parties" but rather requires that the suit be "between . . . citizens of different States." 28 U.S.C. § 1332(a). This Court settled in *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U.S. 356, 365 (1921), that the residency of unnamed class members is irrelevant *not* because they are not "parties" but because they are similarly situated to intervenors, who are not considered for purposes of diversity jurisdiction. 255 U.S. at 363-66. This Court has since described the import of *Ben-Hur* as requiring that "no nondiverse members are *named* parties." *Snyder* v. *Harris*, 394 U.S. 332, 340 (1969) (emphasis added).[9]

At bottom, the Seventh Circuit's reasoning confuses "party" status under Fed. R. App. P. 3 with the wholly separate question of whether any given person is included in the diversity analysis. The two issues are simply not coextensive. There are instances in which persons who are indisputably "parties" for purposes of appeal are not counted towards the complete diversity requirement, and there are likewise instances in which persons with only an indirect relation to the litigation *are* counted in the diversity analysis.

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[9] This explanation of *Ben-Hur* is fully consistent with another of this Court's precedents that makes clear that absent class members are parties to the litigation: *Zahn* v. *International Paper Co.*, 414 U.S. 291 (1973), in which the Court held that the claims of non-named plaintiffs, like those of named plaintiffs, must meet the requisite jurisdictional amount in diversity cases under 28 U.S.C. § 1332.

Compare *Ben-Hur*, 255 U.S. at 365 (citing *Stewart* v. *Dunham*, 115 U.S. 61, 64 (1885), for the proposition that citizenship of intervenors is not counted for diversity), with 28 U.S.C. § 1332(c)(1) (citizenship of nonparty insureds counted for diversity).[10] Because class members are not actually brought into the case until the class is certified, see *infra* at 24-28, and hence well after jurisdiction over the *case* has attached, their status as non-diverse "parties" would have no impact on existing diversity jurisdiction. *Ben-Hur*, 255 U.S. at 366 ("intervention of [non-diverse] citizens in the suit would not have defeated the jurisdiction already acquired").[11]

B. Once the Class Is Certified, Objectors Are "Parties to the Judgment," and Therefore Have the Right to Appeal.

When a district court certifies a class action pursuant to Rule 23 and resolves the case by entering a final judgment approving a settlement, each class member is a "party" to the judgment. The class representative holds that title not merely because his claims are "representative" – *i.e.*, typical – of the other class members, but because he affirmatively "represents" the class members who are parties bound by the court's ruling without personally participating in the litigation on an ongoing basis. Long ago, this Court adopted the

[10] The fact that unnamed class members are "parties" for purposes of the right to appeal is fully consistent with the rule that only the residency of the class representatives is relevant to the determination of diversity jurisdiction.

[11] The Tenth Circuit has implicitly rejected the view that objectors are not "parties"; while that court generally agrees with the Seventh Circuit that objectors may not appeal, it does permit objectors to appeal orders awarding *attorney's fees*. *Rosenbaum* v. *MacAllister*, 64 F.3d 1439, 1442-43 (1995). That limited right of appeal makes no sense under a theory that objectors are not parties. If objectors are not permitted to appeal the approval of the settlement itself, there is no basis for nonetheless permitting them to appeal a collateral ruling that less directly affects their interests.

English rule that a court of equity could permit "a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court." *Smith* v. *Swormstedt*, 57 U.S. 288, 303 (1850). Under current practice, "'[A]ll members of the class, whether of a plaintiff or a defendant class, are bound by the judgment entered in the action unless, in a Rule 23(b)(3) action, they make a timely election for exclusion.'" *Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U.S. 367, 379 (1996) (quoting 2 NEWBERG, CLASS ACTIONS § 2755, at 1224 (1977), and citing *Cooper* v. *Federal Reserve Bank of Richmond*, 467 U.S. 867, 874 (1984)).[12]

As this Court's precedents consistently recognize, an unnamed class member who is bound by the judgment is therefore not a "nonparty." To the contrary, the entire point of class actions is that "[i]t is manifest that to require *all the parties* to be brought upon the record * * * would amount to a denial of justice." *Swormstedt*, 57 U.S. at 303 (emphasis added). Thus, this Court's leading precedents on the binding effect of class action judgments explain that "[t]he *absent parties* would be bound by the decree so long as the *named parties* adequately represented the absent class and the prosecution of the litigation was within the common interest." *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 808 (1985) (emphasis added) (discussing reasoning of *Hansberry* v. *Lee*, 311 U.S. 32, 41 (1940)).

The critical stage of the proceeding for triggering objectors' right to appeal is class certification. Once the class is certified (and, in (b)(3) class actions, class members are given the opportunity to opt out), class members "are either nonparties to the suit and ineligible to participate in a recovery or to be bound by a judgment, or else they are *full*

[12] As noted *supra* at 5, because this class action was not certified under subsection (b)(3), petitioner and other objectors had no opportunity to opt out.

members who must abide by the final judgment, whether favorable or adverse." *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538, 549 (1974). See also, *e.g.*, *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 836 (1999) (describing unnamed class members as "absent parties"); *Hansberry*, 311 U.S. at 42 (same).[13]

This Court's precedents addressing mootness issues in the context of class actions similarly support the conclusion that every class member is a "party" in a properly certified class action. In *Sosna* v. *Iowa*, 419 U.S. 393 (1975), for example, this Court held that when a class representative's individual claim is mooted on appeal, a live case or controversy remains in light of the claims of the remaining class members. "When the District Court certified the propriety of the class action, the class of unnamed persons described in the certification acquired a legal status separate from the interest asserted by [the] appellant [class representative]." 419 U.S. at 399. In an accompanying footnote, the Court reasoned that class certification has "important consequences" because "[i]f the suit proceeds to judgment on the merits, it is contemplated that the decision will bind all persons who have been found at the time of the certification to be members of the class." *Id.* at 399 n.8. It is only the fact that some parties to the case retain a continuing interest that precludes mootness despite the elimination of any personal interest on the part of the class representative.

The Court has consistently adhered to the principle that members of a properly certified class have a concrete interest in the litigation independent of that of the representative. Compare *Franks* v. *Bowman*, 424 U.S. 747 (1976) (applying *Sosna* to hold Title VII class action not moot notwithstanding that named plaintiff no longer had viable claim), and *United*

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[13] The absence of a class certification procedure under Rule 23.1 is yet another respect in which Rule 23 class actions are distinct from derivative suits.

States Parole Comm'n v. *Geraghty*, 445 U.S. 388 (1980) (extending *Sosna* to hold claim not moot even in absence of certified class because claim was "capable of repetition, yet evading review") with *Kremens* v. *Bartley*, 431 U.S. 119 (1977) (holding *Sosna* inapplicable when intervening developments seriously called class certification into question), and *Board of School Comm'rs* v. *Jacobs*, 420 U.S. 128 (1975) (per curiam) (holding *Sosna* inapplicable when no class action was properly certified).

This case illustrates perfectly that the right to appeal is not limited to "named parties." If petitioner is not a "party" with the right to appeal the settlement, he similarly could not appeal the district court's denial of his motion to intervene or the district court's entry of an injunction against him. But neither respondents nor the court of appeals even attempts to take that untenable position.

If petitioner *does* have the right to appeal the denial of his intervention motion and the injunction – as he must – that must be because the rulings directly affected petitioner and were binding upon him. Party status for purposes of appeal thus is measured by reference to the specific final judgment or order from which the appeal is taken, not by reference to the case caption or to the case as a whole. A person whose rights were adjudicated by a particular final ruling – be that ruling a denial of a motion or the final disposition of the case – is a party to that ruling and thus meets all of the formal requirements for appealing from that ruling as a "party * * * taking the appeal."

The same logic that allows petitioner to appeal from the denial of intervention or the entry of an injunction against him thus establishes that he may appeal the entry of the settlement over his objection. The plan trustees brought this lawsuit *precisely* for the purpose of resolving their obligations *vis-à-vis* all the plan members, each of whom was defined as a member of the mandatory class. The trustees and the class representatives then jointly sought class certification for the

purpose of settling the case and binding each class member to the court's judgment. Petitioner properly presented his objections to the settlement to the district court, which rejected them. The judgment, moreover, binds petitioner (as respondents and the district court invoked in entering an injunction against petitioner from acting in contravention of the settlement). The court's final judgment approves a substantial reduction in petitioner's pension and furthermore extinguishes petitioner's personal right to sue the plan to reinstate his benefits and to challenge the trustees' actions through litigation.[14]

There accordingly can be no reasonable dispute that petitioner is thus a party to the judgment, and his formal objections to the settlement – submitted on the record and as of right under Rule 23(e) – make him a party for purposes of appealing that judgment based on those objections.

III. The Fourth Circuit's Rationale for Denying Unnamed Class Members the Right to Appeal Is Flawed.

The Fourth Circuit held that objectors lack "standing" to appeal a class action settlement not due to any formal defect in status, but rather because of its view that such appeals

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[14] That the Federal Rules of Civil Procedure recognize objectors as "parties" is also implicit in the fact that absent class members are often allowed discovery into the justification for a class settlement, precisely because of their undisputed interest in the litigation. 2 H. Newberg & A. Conte, NEWBERG ON CLASS ACTIONS § 11.57 (3d ed. 1992); see, *e.g.*, *In re General Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1126 (CA7), *cert. denied*, 444 U.S. 870 (1979). Since, under the Federal Rules of Civil Procedure, discovery may be obtained only by parties to the action, or those expecting to become parties, Fed. R. Civ. P. 27, it is clear that the courts view absent class members as parties for discovery purposes. *See* Fed. R. Civ. P. 26(b)(1) ("*[p]arties* may obtain discovery" regarding relevant, non-privileged matters), Fed. R. Civ. P. 33 ("*any party* may serve upon any other party written interrogatories"), Fed. R. Civ. P. 34 ("*[a]ny party* may serve upon any other party" document requests).

would undermine orderly class action litigation as a policy matter. As we explain *infra*, the court of appeals was mistaken in its policy analysis. But at the outset, there was no warrant for the Fourth Circuit to impose its own policy-based restriction on appeals "as of right" that lacks any basis in statute, rules, or the Constitution (see *supra* Part I) or in this Court's precedents recognizing the traditional rule that appeals are generally limited to "parties" (see *supra* Part II).

No doubt, class actions – like all suits – could be made more "efficient" if fewer appeals were allowed or if the right to object were eliminated altogether. But the appropriate means of balancing efficiency against fairness concerns is through legislation or the established procedures for revising the Federal Rules of Civil and Appellate Procedure, subject to due process constraints. Cf. *Ortiz*, 527 U.S. at 861 ("The nub of our position is that we are bound to follow Rule 23 as we understood it upon its adoption, and that we are not free to alter it except through the process prescribed by Congress in the Rules Enabling Act.").

A. An Objector's Appeal Does Not Usurp the Role of the Class Representative.

Contrary to the view of the majority below, an objector's appeal of the approval of a class action settlement does not "usurp" the prerogatives of the class representative, for the simple reason that Congress has not granted the representative the power independently to settle the case or to prevent other class members from appealing. Throughout much of the case, the representative acts as the champion of the absent class members and thus has extensive authority to act in their interests with respect to matters such as discovery and the course of trial litigation. The adversarial posture of the case provides assurance that the interests of absent class members will be protected. Class members therefore have no *per se* right to object to the course of the litigation except by asserting that the representative is not acting in the interests of

the class or by moving to intervene in the ongoing conduct of the case.

By contrast, when the representative enters into a proposed settlement with the opposing party and urges the district court to approve the settlement, "the procedural protections built into the Rule to protect the rights of absent class members during litigation" are essentially absent. *Ortiz*, 527 U.S. at 847. Rule 23(e) therefore provides that no settlement may be approved "without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."

The protections provided by Rule 23(e) are critical. As this Court explained in *Amchem*, "The inquiry appropriate under Rule 23(e) * * * protects unnamed class members 'from unjust or unfair settlements affecting their rights when the representatives become fainthearted before the action is adjudicated or are able to secure satisfaction of their individual claims by a compromise.'" 521 U.S. at 623 (quoting 7A Wright *et al.* at 518-19). As the Second and Third Circuits have recognized, "It is no secret that in 'seeking court approval of their settlement proposal, plaintiffs' attorneys' and defendants' interests coalesce and mutual interest may result in mutual indulgence.'" *Kaplan* v. *Rand*, 192 F.3d 60, 67 (CA2 1999) (quoting *Bell Atl. Corp.* v. *Bolger*, 2 F.3d 1304, 1310 (CA3 1993)).

The Fourth Circuit failed to recognize this important limit on the class representative's power and thus failed to recognize that the representative has no more authority to prevent a settlement from being challenged on appeal than to prevent objections from being presented in the first place. To the contrary, once the settlement is approved, concerns that the class representatives are no longer acting adverse to the opposing parties (and thus are less responsive to the interests of other class members) are even greater. At least in the district court, the class representatives and opposing parties

have some incentive to accommodate objections in order to secure approval of the settlement. But once the district court enters an order approving the settlement, the class representative unquestionably will not pursue an appeal on behalf of the objectors.

Nor do objectors "usurp" the role of the class representatives when they appeal. Rather, after a settlement is reached, the interests of the class representatives and the objecting class members necessarily diverge and the representative effectively ceases to pursue the interests of the objectors. In the court of appeals, the objector proceeds in his individual capacity rather than as a representative of the class as a whole and he has no obligation to pursue any interest other than his own.[15] Straightforward examples include appeals by objectors challenging the application of a settlement to their unique circumstances (cf. *supra* at 8 n.4 (discussing objections of individual class member)) or challenging the district court's refusal to permit them to opt out (*e.g.*, *Adams* v. *Robertson*, 520 US 83 (1997)) or to include them within the class (*e.g.*, *Berger* v. *Iron Workers Reinforced Rodmen*, 170 F.3d 1111 (CADC 1999)). The Fourth Circuit's rule, however, prohibits objectors from pursuing even these wholly individual interests on appeal.

In other instances, the objector's argument on appeal will have broader application. That was true in *Amchem*, in which the objector successfully raised an array of challenges to a settlement class action. It is also true in this case. But the fact that a settlement will likely be invalidated if an objector prevails on an argument of general applicability to the class does not mean that the objector is improperly acting as the class "representative." The objector is simply pursuing his individual interest on appeal just as he did in the district court,

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[15] The appeal thus would not proceed if the appealing objector withdrew it (unless another objector were permitted to intervene on appeal and take his place).

where the settlement would have been similarly invalidated if the district judge had agreed with the objection. That result is merely the consequence of the principle of judgments that "any objection [of a class member] sustained would inure to the benefit of all." *Mullane*, 339 U.S. at 319.

B. Appeals by Objectors Further Sound Principles of Judicial Administration And Preserve Objectors' Due Process Rights.

The majority below similarly erred in asserting that objector appeals would undermine "effective class management." Pet. App. A21. As already noted, a class member has an absolute right to present objections to the settlement under Rule 23(e) and thus to challenge the class representative's management of a particular aspect of the case – *viz.*, settlement. But the adversarial procedure of objectors and the class representative does not *undermine* effective class management; it *is* effective class management because it is essential that settlements affecting absent class members be subjected to adversarial testing. There is no reason to believe that "effective class management" would be undermined if the identical objections were considered by the court of appeals. It is therefore not surprising that neither respondents nor the Fourth Circuit identified any evidence that adverse effects had arisen in the several circuits that permit objector appeals.

Nor is there any merit to the argument that appeals by objectors should be prohibited in order to speed the disposition of the case. That argument proves too much, for it improperly elevates finality above the error-correcting function of the appellate courts and would justify eliminating *all* appeals from any judgment or order in any case. As Judge Easterbrook has recognized in concluding that intervention must be freely granted to objectors for the purpose of appeal, the "possibility that [the appellate court] would see merit to their appeal cannot be called 'prejudice'; appellate correction

of a district court's errors is a benefit to the class." *Crawford* v. *Equifax Payment Servs., Inc.*, 201 F.3d 877, 881 (CA7 2000).[16]

If anything, a rule permitting objectors to appeal enhances the integrity and efficacy of class action proceedings. Rule 23(e) guarantees class members notice and an opportunity to be heard, in part, because objections advise the district court of potential flaws in the settlement and furthermore deter collusive settlements. While class actions can be enormously useful tools for the efficient provision of justice, they have substantial and well-recognized dangers. See *Weinberger* v. *Great Northern Nekoosa Corp.*, 925 F.2d 518, 524 (CA1 1991) ("[Class] lawyers might urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment on fees."). Permitting objections to be pursued on appeal provides an additional layer of deterrence against self-dealing by the class representatives and their lawyers. In particular, the attorneys negotiating the settlement will be more attentive to the interests of the entire class if they know that objections will receive a thorough review, including on appeal if necessary.

The dynamics of the settlement process in the district court generally tend to undermine the effectiveness of

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[16] Restricting appellate review of class actions will also create an incentive to abuse the procedure at the outset. When a class is not sufficiently "numerous" to satisfy Rule 23, the action may be permitted to proceed only if each individual is formally joined as a named party. Fed. R. Civ. P. 19. In that circumstance, the joined parties will frequently be represented by a single counsel who handles the course of litigation. But there can be no serious argument denying that each of the joined parties has an independent right to appeal an adverse judgment. The only result of holding that a similarly situated class action objector – effectively a party joined categorically rather than by name, and represented by joint counsel – nonetheless may not appeal would be to encourage the use of class actions as a tool to eliminate the rights of objectors rather than as a tool to *protect* the interests of class members by reducing the burden of litigation.

existing safeguards against problematic settlements. Once a class action settlement is reached, the district court's first action is usually to grant "preliminary approval," which is a finding – almost always untested by adversarial presentation – that the settlement contains no obvious substantive or procedural defects. MANUAL ON COMPLEX LITIGATION THIRD, § 30.41, at 237 (Federal Judicial Center 1995) ("MANUAL").[17] After preliminary approval, the proponents of the settlement expend a considerable sum notifying the class of the settlement. Thereafter, the same district judge who preliminarily approved the settlement presides over a "fairness hearing" and decides whether to give final approval under Rule 23(e). See *id.* §§ 30.41-.42. Given the initial blessing of the district court, the expense of mounting objections, and the complexity of many settlements, the settlement may rightly be viewed by class members as a "fait accompli." *Mars Steel Corp.* v. *Continental Ill. Nat'l Bank & Trust Co.*, 834 F.2d 677, 681 (CA7 1987).

Not surprisingly, the presentation of an unchallenged proposed settlement to a district court therefore can create a hydraulic pressure for approval, a fact apparent from data showing that fairness hearings in district courts tend to be brief and generally do not result in changes to settlements crafted by the class representative and opposing parties. See John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1348 & n.14 (1995) (empirical evidence suggests that "courts have little ability or incentive to resist [proposed] settlements"; data shows median hearing lengths in two districts of 38 and 40 minutes); Federal Judicial Center, EMPIRICAL STUDY OF

[17] In almost all cases, potential objectors are not even aware of the preliminary hearing because they have yet to receive notice of a settlement. Indeed, in settlement class actions such as *Amchem*, in which settlement and certification are simultaneous, at the time of the preliminary hearing the class members have no idea that a lawsuit even exists.

CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS 58 (1996) ("Approximately 90% or more of the proposed [class] settlements were approved without changes in each of the four districts."). Fairness hearings in some courts are "typically pep rallies jointly orchestrated by plaintiffs' counsel and defense counsel" in which the district courts "engage in paeans of praise for counsel or lambaste anyone rash enough to object to the settlement." Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action & Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 46-47 (1991).

The prospect of appellate review of judgments approving class action settlements (like the prospect of appellate review in *every* case) also causes the district judge to be fully attentive to the objections before him. A principal value of the appeals process is that it "induc[es] trial court judges to make fewer errors because of their fear of reversal." Steven Shavell, *The Appeals Process as a Means of Error Correction*, 24 J. LEGAL STUD. 379, 408-11, 425-26 (1995). Moreover, appeals correct errors. Decisions such as *Amchem* – which reached this Court only because the Third Circuit permits objectors to appeal – demonstrate that there is a substantial role for the appellate courts to play in evaluating class action settlements.

Finally, any doubt must be resolved in favor of permitting class members to appeal because it would be inconsistent with due process to limit an objector's recourse to a "likely futile objection at the fairness hearing required by Rule 23(e)." Samuel Issacharoff, *Class Action Conflicts*, 30 U.C.D. L. REV. 805, 822 (1977), *quoted in Ortiz*, 527 U.S. at 850 n.27. This Court's decision in *Shutts* settled that "before an absent class member's right of action was extinguishable due process required that the member 'receive notice plus an opportunity to be heard and participate in the litigation.'" *Ortiz*, 527 U.S. at 848 (quoting *Shutts*, 472 U.S. at 812); see

also *Mullane*, 339 U.S. at 314 (class action procedures must "afford [class members] an opportunity to present their objections"); cf. *Matsushita*, 516 U.S. at 399 (Ginsburg, J., concurring in part and dissenting in part) (writing separately to "stress" applicability of procedural due process protections for absent parties in class actions, "emphatically including those resolved by settlement"). Due process concerns are only heightened when, as in this case, objectors are not permitted to opt out: "The inherent tension between representative suits and the day-in-court ideal is only magnified if applied to damage claims gathered in a mandatory class." *Ortiz*, 527 U.S. at 846.[18]

C. Requiring Prophylactic Intervention in the District Court Poses a Greater Threat to Class Management than Does a Right to Appeal Based on Objections under Rule 23(e).

If anything, it is the Fourth Circuit's holding that objectors have the right to appeal only if they *intervene* that has the greatest potential to undermine orderly class management. Rather than channel class-member participation through the Rule 23(e) procedures, as the district court sought to do in this case, the Fourth Circuit's approach encourages widespread participation throughout the proceedings.[19] Class members who would not otherwise move to intervene will do so protectively because they cannot know *ex ante* if (i) the case will be settled, (ii) what the

[18] The settlement also implicates the class member's Seventh Amendment right to pursue his claim to a jury trial. Cf. *Ortiz*, 527 U.S. at 846 ("By its nature, however, a mandatory settlement-only class action with legal issues and future claimants compromises their Seventh Amendment rights without their consent.").

[19] Once admitted by the district court as named parties, intervenor-objectors will presumably feel the need to voice all potential objections at every step of the proceeding out of a concern that silence will be deemed acquiescence or waiver.

settlement might provide, (iii) if they will have an objection to the settlement, (iv) whether the named parties will accommodate their objection, (v) whether the course of the litigation will demonstrate that the opposing party has a strong case, such that the settlement ought to be accepted notwithstanding its flaws, or (vi) if not, whether the district judge will sustain the objection. And if district courts instead deny such protective motions to intervene, then the courts of appeals will be burdened with interlocutory appeals of denials of those motions. See *supra* at 11.

Rule 23 was designed precisely to avoid numerous individuals becoming deeply involved in the litigation as named parties, as this Court settled in rejecting an intervention requirement in the closely analogous circumstances of *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974). *American Pipe* held that the pendency of a class action tolls the statute of limitations for putative class members in the event class certification is later denied. In reaching that holding, the Court specifically rejected the defendant's principal argument the statute should be tolled only if the putative class members intervened to become individually named parties.

If an intervention requirement were adopted, the Court explained, "[p]otential class members would be induced to file protective motions to intervene or to join in the event that a class was later found unsuitable." 414 U.S. at 553. This result "would frustrate the principal function of a class suit" because litigation over motions to intervene would give rise to "precisely the multiplicity of activity which Rule 23 was designed to avoid in those cases in which a class action is found 'superior to other available methods for the fair and efficient adjudication of the controversy.'" *Id.* at 551 (quoting Fed. R. Civ. P. 23(b)(3)). The Court has subsequently reiterated the rationale of *American Pipe* that, if intervention were required, "members of a class would have an incentive to protect their interests by intervening in the

class action as named plaintiffs prior to the decision on class certification" – a "needless duplication of motions" that would "deprive Rule 23 class actions of the efficiency and economy of litigation which is a principal purpose of the procedure." *Chardon* v. *Fumero Soto*, 462 U.S. 650, 659 (1983).

Moreover, if (as the Fourth Circuit held in this case) an intervention requirement is anything other than *pro forma*, it will not protect the interests of objectors because the district court may simply deny the intervention motion. As this Court explained in holding that a putative class member who files a separate action rather than eventually intervening is entitled to the tolling doctrine of *American Pipe*, "permission to intervene might be refused for reasons wholly unrelated to the merits of the claim": "Putative class members frequently are not entitled to intervene as of right under Federal Rule of Civil Procedure 24(a), and permissive intervention under Federal Rule of Civil Procedure 24(b) may be denied in the discretion of the District Court." *Crown, Cork & Seal Co.* v. *Parker*, 462 U.S. 345, 350 & n.4 (1983). That is, of course, precisely what happened in this case, in which the district court denied petitioner's motion to intervene (which he filed *immediately* upon learning of the settlement) as untimely because he knew of his interest in the litigation at an earlier date.

An intervention requirement would amount to no more than a trap for the unwary. When a class action is settled, notice is sent out to class members (frequently numbering in the thousands) who, in the main, *are not represented by counsel* and are left to their own devices to ascertain their rights. The notice informs the class members of the nature of the litigation, the terms of the settlement, and where and when they must file their objections. MANUAL, § 30.41, at 237. Thus, even if we assume that a class member represented by counsel should know of the need to intervene (quite a stretch given the large number of reported decisions showing

otherwise), imposing that requirement on a *pro se* objector is at odds with reality. A layperson will not be aware of the niceties of federal procedure under Rule 24, and, thus, to condition the right to appeal on such knowledge would be illogical and unfair.

Even if objectors understand their rights, an intervention requirement would impose substantial unwarranted burdens. Potential intervenors must file a motion to intervene, along with a "complaint in intervention," setting out the claims that they believe are not being adequately advanced by the named plaintiffs, or a defensive pleading "setting forth the * * * defense for which intervention is sought." Fed. R. Civ. P. 24(c). Assuming the motion is granted, intervenors also often must file mandatory disclosures and are subject to discovery. Throughout the litigation, they will be forced to incur substantial fees and costs.[20]

Alternatively, uncertainty regarding the availability of an appeal may encourage class members to institute collateral attacks on the judgment or (in (b)(3) class actions) opt out. Indeed, one appellate decision has asserted that the availability of collateral attack is a viable alternative to appeal, and thus supports an intervention requirement. *Guthrie* v. *Evans*, 815 F.2d 626, 628 (CA11 1987). But that approach ought not be the rule, for it is unfair to class members and is far more destructive to finality than is the availability of direct appeal on the merits of any objections.

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[20] Cf. *Shutts*, 472 U.S. at 813 (declining to require that class action plaintiffs "opt in" because "[t]he plaintiff's claim may be so small, or the plaintiff so unfamiliar with the law, that he would not file suit individually, nor would he affirmatively request inclusion in the class if such a request were required by the Constitution," particularly given the number of class members "'who for one reason or another, ignorance, timidity, unfamiliarity with business or legal matters, will simply not take the affirmative step'" (quoting Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 397-98 (1967)).

Furthermore, while such collateral attacks should be disfavored because they create uncertainty regarding the validity of the settlement, they do not provide the benefits of appeals from orders approving settlements because collateral attacks are essentially limited to the assertion that the class representative was inadequate. See generally Kahan & Silberman, *The Inadequate Search for 'Adequacy' in Class Actions: A Critique of Epstein v. MCA, Inc.*, 73 N.Y.U. L. REV. 765, 780 & n.69 (1998) (hailing superiority of comprehensive direct review over collateral attack and criticizing intervention requirement as potential impediment to appellate review). Regardless of the scope of the collateral attack, the better rule would be to permit challenges to a class action settlement to be heard in the original forum, with direct appellate review, rather than to encourage each class member to file a separate suit, in a distant forum, challenging the *res judicata* effect of a previously entered class action judgment. Rule 23 was amended in 1966 to eliminate "[a] recurrent source of abuse under the former Rule": "the potential that members of the claimed class could in some situations await developments in the trial or even final judgment on the merits in order to determine whether participation would be favorable to their interests." *American Pipe*, 414 U.S. at 547.

An intervention requirement is also unwarranted because that procedural hurdle would produce no benefit to class action litigation. By definition, absent class members must hold the same claims as the named plaintiffs. See *General Telephone Co. of the Southwest* v. *Falcon*, 457 U.S. 147, .56 (1982); see also Fed. R. Civ. P. 23(a)(2), (3). Because objectors challenge the settlement of a previously filed complaint, it would make no sense to require them to file their own "complaint in intervention" or any other pleading seeking to impose liability on the adverse party. Because the adversity of interests between settlement supporters and settlement objectors is clear and irreparable, the drafters of Rule 23 could not have contemplated that objectors would be

put through the Rule 24 process as a matter of course in order to preserve their right to appeal.

This case illustrates perfectly that the Fourth Circuit's rule requiring intervention will only make class action litigation less efficient. In this appeal, petitioner seeks only to pursue his objections to the *settlement* – for example, that it unlawfully eliminated an accrued benefit to the retiree subclass and that it unfairly failed to retain the COLA by requiring current employees to make pension contributions, just as retirees such as petitioner had done in the past. If petitioner had been permitted to intervene as a full participant in the case, he could have pursued not merely those issues but also his requests for discovery, for an injunction, and to disqualify the class counsel. And, of course, if the district court had denied those requests, petitioner would have had the right to appeal.

IV. IF INTERVENTION IS REQUIRED, IT SHOULD BE FREELY GRANTED AND DEEMED SUFFICIENT FOR PURPOSES OF APPEAL IF AT LEAST SOUGHT SOON AFTER THE DENIAL OF OBJECTIONS.

If this Court *does* hold that a class member must intervene in order to appeal, the judgment nonetheless must be reversed. In *United Airlines* v. *MacDonald*, 432 U.S. 385 (1977), the district court denied class certification and subsequently ruled for the named plaintiffs on the merits. Because certification had been denied, the putative class members were not "parties" bound by the judgment with the right to appeal. They accordingly moved to intervene in order to appeal the certification ruling. This Court held that putative class members' motion to intervene was "timely" under Rule 24 as a matter of law since they "acted promptly after the entry of final judgment." 432 U.S. at 396.

The Court specifically rejected the defendant's argument that the class members were required to intervene earlier in

the case. Such a requirement, the Court explained, "would serve no purpose": "Intervention at that time would only have made the respondent a superfluous spectator in the litigation for nearly three years, for the denial of class certification was not appealable until after final judgment." 432 U.S. at 395 n.15. Citing *American Pipe*, the Court continued: "such a rule would induce putative class members to file protective motions to intervene to guard against the possibility that the named representatives might not appeal from the adverse class determination. The result would be the very 'multiplicity of activity which Rule 23 was designed to avoid.'" *Id.*

On the reasoning of *United Airlines*, petitioner was *a fortiori* entitled to appeal because he formally sought to intervene promptly upon receiving a copy of the proposed settlement, well before the proposal was even distributed to the class and well before his Rule 23(e) objections were rejected by the court. The Fourth Circuit's holding that petitioner was required to intervene earlier in order to preserve his right to appeal the settlement makes no sense – and invites a deluge of protective intervention motions – because the named parties had not even reached a settlement at that point. And, even if the district court believed that full participation as an intervenor would have been unduly disruptive, under the logic of *United Airlines*, the district court could have granted petitioner limited intervention rights. The court did not do so, however, only because it already believed that petitioner had the right to appeal as an objector. See *supra* at 8. Indeed, respondents themselves led the district court to reach that conclusion when they proposed a class notice that explicitly contemplated appeals by objectors and subsequently when they successfully opposed petitioner's intervention on the ground that he had the full right to contest the settlement as an objector. See *supra* at 6-7.

* * * *

There is no reasonable dispute that class action objectors have a sufficient interest in the district court's judgment approving a settlement to take an appeal. The Fourth Circuit's holding that objectors nonetheless must intervene to appeal is unsound. The district court may refuse to permit intervention. If, on the other hand, the intervention requirement is deemed *pro forma*, it serves no purpose at all and promises to be merely a burdensome trap for the unwary.

CONCLUSION

For the foregoing reasons, the decision of the Fourth Circuit should be reversed.

Respectfully submitted,

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